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Reconstructing Erie: A Comment on the Perils of Legal Positivism.

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RECONSTRUCTING *ERIE*: A COMMENT ON THE PERILS OF LEGAL POSITIVISM

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The opinion in *Erie Railroad Co. v. Tompkins* overruled *Swift v. Tyson* in a single definitive sentence: "There is no federal general common law."[1] As we subsequently learned, however, "*Erie* did not merely overrule a venerable case" but "a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare."[2] That older way of looking at law took it to be a "brooding omnipresence in the sky," independent of the actions of public institutions and officials.[3] *Erie* rejected this view—a form of natural law—in favor of legal positivism, the contrary view that all forms of law are derived from the actions of government. This comment discusses the jurisprudential foundations of *Erie*. Part I places the positivist argument in *Erie* in the context of the other, more conventional legal arguments in the opinion. Part II examines the dominant modern conceptions of legal positivism and how they apply to the decision in *Erie*. And Part III examines the consequences of legal positivism, especially for the new federal common law that has grown up after *Erie*.

I. THE ARGUMENTS OF *ERIE*

In his opinion in *Erie*, Justice Brandeis offered several conventional legal arguments for denying the existence of federal general common law. These are arguments based on the legislative history of the Rules of Decision Act; on the inconsistency between federal

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1. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

2. *Guaranty Trust Co. v. York*, 326 U.S. 99, 101 (1945).

3. The phrase, of course, is from Holmes. When he first used it, in a dissent, he acknowledged the possibility that it was a minority view. "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). Legal positivism has since become the working legal theory of most judges and lawyers. Ronald Dworkin, *Taking Rights Seriously* 16 (Harv. U. Press, 1978).

general common law and state common law; and on the unconstitutionality of *Swift v. Tyson*. With the passage of time, each of these arguments has come under attack and each has been abandoned, revised or reinterpreted. The argument based on legal positivism, although it plays a crucial role in the last and most important of these arguments, has yet to be reassessed in light of subsequent developments. A brief review of the conventional legal arguments in the opinion will put the jurisprudential argument in perspective.

Justice Brandeis began his opinion by relying upon then-recent research into the history of the Rules of Decision Act.[4] Professor Charles Warren, he claimed, had demonstrated that the First Congress intended state common law, in addition to state statutory law, to be included within "the laws of the several states" that were binding on the federal courts.[5] The legislative history, however, is at least ambiguous; and as Professor Wilfred Ritz has more recently argued, it demonstrates instead that the act was intended to serve as a stopgap measure until a body of federal legislation could be enacted.[6] To the extent that Congress considered the meaning of the phrase "the laws of the several states," it probably meant to refer to the laws of the states collectively. At the time, the law of any one state, much like federal law, was too undeveloped to provide much guidance to federal judges.[7]

Justice Brandeis's next argument has fared better, although it has always been of limited force. He argued that the inconsistencies between the federal general common law applied by the federal courts and the state common law applied by the state courts "rendered impossible equal protection of the laws."[8] By this phrase, of course, he did not mean a denial of equal protection under the Fourteenth Amendment, because *Swift v. Tyson* was federal law, and, at the time, the Fifth Amendment was not interpreted to have an equal protection component.[9] What he meant was inequitable

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4. 304 U.S. at 72-73.

5. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 51-52, 81-88, 108 (1923).

6. The anticipated federal legislation was a federal criminal code. The essential purpose of the Rules of Decision Act therefore foundered on the refusal of the Supreme Court to recognize a common law of crimes. Wilfred J. Ritz, *Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises, and Using New Evidence* 131-34, 140-48 (U. of Okla. Press, 1990).

7. Id. at 44-52, 83-87, 140-41.

8. 304 U.S. at 73-78.

9. Only later was the Equal Protection Clause effectively incorporated into the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). For instance, in *United States v. Carolene Products*, 304 U.S. 144 (1938), which was decided the same day as *Erie*, the Court routinely denied an equal protection claim against the federal government. Id. at 151.

administration of the laws resulting from forum shopping.[10] This argument has since had to accommodate the need for distinctive rules of federal procedure.[11] More fundamentally, the disparity introduced by *Swift v. Tyson* could be eliminated equally well by a further assertion—rather than a disclaimer—of federal power. Federal common law could be made binding on the state courts, in the same manner that federal statutory law is binding upon them under the Supremacy Clause.[12]

This leaves the only argument that Justice Brandeis found sufficient to overrule *Swift v. Tyson*: that it was an unconstitutional assumption of powers by the federal courts.[13] The major premise of this argument was that the federal government is one of limited powers. The minor premise was that the Constitution conferred the lawmaking power of the federal government mainly on Congress. It followed that the federal courts had no power to make general common law that exceeded the lawmaking powers of Congress. Yet the general federal common law extended to areas beyond the powers of Congress.

At the time, this argument had the rhetorical force of a *reductio ad absurdum*. Of course the power of the federal courts to make law could not exceed the power of Congress (at least if we put constitutional decisions to one side). The significance of this observation, however, has been eroded in the years since *Erie* was decided. The subsequent expansion of congressional power now allows Congress to reach most, if not quite all, of the area formerly covered by the federal general common law. On the facts of *Erie* itself, as many

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10. John C. McCoid, II, Hanna v. Plumer: *The* Erie *Doctrine Changes Shape*, 51 Va. L. Rev. 884, 888-90 (1965).

11. *Hanna v. Plumer*, 380 U.S. 460 (1965); McCoid, 51 Va. L. Rev. at 887-901 (cited in note 10) (*Hanna* greatly restricts the policy of uniformity underlying the *Erie* doctrine).

12. U.S. Const. art. VI. The new federal common law, of course, is binding on the state courts. See, e.g., *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962).

13. 304 U.S. at 78-80. He also alluded to this argument earlier in the opinion. "The federal courts assumed, in the broad field of 'general law,' the power to declare rules of decision which Congress was confessedly without power to enact as statutes." Id. at 72.

This was not, of course, the view that animated the opinion in *Swift v. Tyson*. Justice Story did not view a decision under the general common law as one that required a court to lay down a positive rule of law. 41 U.S. (16 Pet.) 1, 18-19 (1842). Expanding upon this principle, the Supreme Court, in its decisions following *Swift v. Tyson*, increasingly disregarded state decisions even on issues of local law on which they were supposed to be binding. Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling* Hans v Louisiana, 57 U. Chi. L. Rev. 1260, 1265-70 (1990).

Even if Story had found judicial decisions to be sources of positive law, a strand of legal thought at the time of *Swift v. Tyson* allowed an inference in the opposite direction from that taken in *Erie*: from the lawmaking powers of the federal courts to equivalent lawmaking powers of Congress. G. Edward White, *History of the Supreme Court of the United States, Volumes III-IV: The Marshall Court and Cultural Change 1815-35* 528-40, 562-75 (Macmillan, 1988).

have pointed out,[14] Congress plainly has the power to establish the rule of liability governing accidents to those walking alongside an interstate railroad. At the time *Erie* was decided, however, this proposition was not quite the foregone conclusion that it is today.[15] Brandeis could not simply assume that Congress had power under the Commerce Clause to replace the rule of federal general common law. Instead he avoided this constitutional question by making a more abstract argument: that federal general common law as a whole was illegitimate because it exceeded the power of Congress, not necessarily on the special facts of the case before the Court, but in a broad range of other cases. Today, precisely the reverse would be true. Most of federal general common law would be well within the power of Congress.[16]

For this reason, the constitutional argument of *Erie* has since been reinterpreted to emphasize the distinction—at least implicit in the opinion—between the power of Congress and the power of the federal courts. The power of Congress is checked by the role of the states within Congress itself, and particularly by the many hurdles that the Constitution places in the way of lawmaking under Article I. The states, through their senators and representatives, have ample opportunity to block federal legislation that would displace state law.[17] No corresponding check operates against the creation of federal general common law. Any major extension of federal power must find its source in the Constitution or in a federal statute, not in the common law decisions of federal judges alone.

This argument is the best current account of *Erie* as a fundamental principle of federalism.[18] In this comment, I do not propose to defend the continued vitality of the *Erie* doctrine. Despite—and perhaps because of—its shift in rationale, it has remained a fundamental principle of federalism as we know it today. The "rather large lake" of ink that Judge Friendly found to have been spilled on this subject nearly thirty years ago has now swelled to a small ocean.[19] Instead of adding to its volume, I would like to concen-

14. E.g., McCoid, 51 Va. L. Rev. at 887-88 n.16 (cited in note 10).

15. *Erie* was decided after *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), but before *Wickard v. Filburn*, 317 U.S. 111 (1942).

16. If, indeed, there are any significant limits on the power of Congress at all. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

17. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 546-52, 558-60 (1954).

18. Its essentials are set forth in John Hart Ely, *The Irrepressible Myth of* Erie, 87 Harv. L. Rev. 693 (1974), and Paul J. Mishkin, *Some Further Last Words on* Erie—*The Thread*, 87 Harv. L. Rev. 1682 (1974).

19. Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39

trate on a single passage in the *Erie* opinion, one which invokes legal positivism to support the limited power of the federal courts to make common law. This passage is worth quoting in its entirety.

> The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is "a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute," that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts "the parties are entitled to an independent judgment on matters of general law":
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> > "But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a state, whether called common law or not, is not the common law generally but the law of that state existing by the authority of that state without regard to what it may have been in England or anywhere else. . . .
> >
> > "The authority and only authority is the state, and if that be so, the voice adopted by the state as its own [whether it be of its legislature or of its Supreme Court] should utter the last word."
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> Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[20]

What is remarkable about this passage is that the last sentence, which argues for overruling *Swift v. Tyson*, contrasts so dramatically—indeed nearly contradicts—all that went before. If "law does not exist without some definite authority behind it," in particular, without the authority of pre-existing judicial decisions, where does the Supreme Court itself obtain the authority to overrule its own pre-existing decision in *Swift v. Tyson*? The Court's deference to state judicial decisions as the only sources of common law contrasts dramatically with its treatment of *Swift v. Tyson*, not to mention the many cases that had followed it, as a source of federal law. If Justice Holmes had discredited natural law, where does legal positivism leave room for the *Erie* decision itself?

The short answer is that the Constitution required the result in

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N.Y.U. L. Rev. 383 (1964), reprinted in H.J. Friendly, *Benchmarks* 155, 156 (U. of Chi. Press, 1967).

20. 304 U.S. at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting) (footnote omitted) (brackets in original)).

Erie. I do not, of course, disagree with this conclusion, but I do deny that it is one that a legal positivist can reach by relying exclusively upon pre-existing sources of law.

II. CURRENT CONCEPTIONS OF LEGAL POSITIVISM

According to the leading proponents of legal positivism today, H.L.A. Hart and Joseph Raz, judges must resort to arguments based on sources outside of law to resolve cases not covered by the existing legal rules.[21] According to Hart and Raz, when pre-existing sources of law, such as statutes, constitutions or precedent, do not yield a single right answer, judges must resort to arguments based on considerations of public policy, morality or practical politics. Hart and Raz regard these sources of argument to be outside of law because their authority cannot be traced back to the action of any recognized public official. With respect to arguments based on morality in particular, they claim that a sharp separation from arguments based on legal sources is necessary to preserve the separation of law from morality.[22] According to the familiar positivist slogan, a law may be immoral and still be law.

Contemporary legal positivists, like Hart and Raz, are more sympathetic to the common law than the nineteenth century legal positivists on whom Holmes, and through him Brandeis, relied. Indeed, it is hard to imagine that anyone could be less sympathetic to the common law than Jeremy Bentham, the founder of legal positivism.[23] His contempt for the common law was not shared by his follower, John Austin,[24] but it was the positivist equivalence of judge and legislator which led Americans, like Holmes,[25] to question the legitimacy of judge-made law. Although this was only one

21. H.L.A. Hart, *The Concept of Law* 131-32 (Clarendon Press, 1961); Joseph Raz, *The Authority of Law: Essays on Law and Morality* 47-50, 194-201 (Clarendon Press, 1979).

22. Hart, *The Concept of Law* at 181-207 (cited in note 21); Raz, *The Authority of Law: Essays on Law and Morality* at 37-38 (cited in note 21). Other theorists, even those who reject legal positivism, have also emphasized that nothing in the concept of law requires it to incorporate moral norms. E.g., Jules L. Coleman, *Markets, Morals and the Law* 4-7 (Cambridge U. Press, 1988); cf. Dworkin, *Taking Rights Seriously* at 326-27 (cited in note 3) (rejecting legal positivism but accepting the distinction between law and morality).

23. Jeremy Bentham, V *Collected Works* 442 (John Bowring, ed., Russell & Russell, 1962) ("that most all-comprehensive, most grinding, and most crying of all grievances—the tyranny of judge-made law"); id. at 235 (judges make common law "as a man makes laws for his dog").

24. John Austin, *The Province of Jurisprudence Determined* 191 (Noonday Press, 1954).

25. Morton J. Horwitz, *The Place of Justice Holmes in American Legal Thought*, in Robert W. Gordon, ed., *The Legacy of Oliver Wendell Holmes, Jr.* 31, 39-46, 68 (Stanford U. Press, 1992); see H.L. Pohlman, *Justice Oliver Wendell Holmes and Utilitarian Jurisprudence* 88-105 (Harv. U. Press, 1984) (Holmes followed Austin in requiring judicial deference to general opinion).

of several contradictory strands in Holmes's thought,[26] it was the strand that Brandeis seized upon in *Erie*. If judges in hard cases legislated by reference to sources outside the law, where did they gain the authority to do so?

Justice Brandeis did not answer this question in *Erie*, despite the fact that he faced a hard case that required him to go beyond existing sources of law. Although the limited delegation of powers to the federal government, explicitly recognized in the Tenth Amendment, faced one way, the decision in *Swift v. Tyson*, and all that had been based upon it,[27] faced the other. It was necessary for Justice Brandeis to appeal to principles of federalism whose source and weight could not be identified simply by tracing them back to the Constitution.[28] The appeal to these principles was no less an assumption of power, although one that we find far more justifiable today, than was the federal general common law that was condemned in *Erie*. Having made this appeal outside of recognized legal sources, Brandeis could not criticize the federal general common law of *Swift v. Tyson* for lacking such a source.

Perhaps, however, Justice Brandeis took a different view of legal positivism from that of Hart or Raz, one that limited the law to the prior decisions of public officials with effective political power, but that did not leave judges free to rely upon sources outside the law. On this view, the quoted passage only asserts that judicial decisions must be backed by the power of the state in order to be sources of law.[29] General common law violates this requirement because it is based on the law of no particular sovereign. Brandeis departed from *Swift v. Tyson*, then, in insisting that the general common law recognized in the federal courts must be fed-

26. G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* ch. 11 (Oxford U. Press, forthcoming September 1993) (Holmes dissented from cases following *Swift v. Tyson*, but also used the power to make federal general common law to lay down rules of tort law inconsistent with state law); see Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 Stan. L. Rev. 787, 836-50 (1989) (summarizing the contradictory perspectives that Holmes took upon the law as a scholar and a judge).

27. This history included precedent that went well beyond *Swift v. Tyson*. It also included reenactment of the Rules of Decision Act in reliance upon *Swift v. Tyson*. Friendly, *In Praise of* Erie—*And of the New Federal Common Law* in *Benchmarks* at 162-63 (cited in note 19).

28. See Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 Mich. L. Rev. 621 (1987).

29. This claim can be derived from Austin's version of positivism, which defined law as commands of the sovereign, or as orders backed by threats. Austin, *The Province of Jurisprudence Determined* at 13-26 (cited in note 24); Hart, *The Concept of Law* at 18-25 (cited in note 21). For the influence of Austin on Holmes, see Horwitz, *The Place of Justice Holmes in American Legal Thought* at 67-68 (cited in note 25); Grey, 41 Stan. L. Rev. at 829 (cited in note 26).

eral law.[30] And once this step was taken, it was necessary to find some source for the federal general common law in the Constitution. Because Brandeis could find no such source, he concluded that there was "no federal general common law."[31]

Brandeis had to do more in *Erie*, however, than accept a truncated version of legal positivism that denied judges discretion to turn to sources outside of pre-existing law. It was not enough for him to discredit the characterization of general common law in *Swift v. Tyson* on positivist principles. As he recognized, he also had to discredit *Swift v. Tyson* itself as a source of law.[32] A truncated version of positivism would not allow him to do that. If he found all judicial decisions backed by state power to be law, he would have had to recognize that the federal general common law was backed by political power—not of the states, but of the federal government—so that it, too, was a source of law. He could discredit this source of law, as he did in *Erie* itself, with a later decision backed by federal power, but he could not justify this decision simply by pointing to its undeniable effects.

Any attempt to justify the decision in *Erie* on positivist principles thus generates the paradox that these principles themselves lacked the pedigree that they required of other sources of law. What Brandeis needed to justify his decision was a hierarchy of legal arguments, so that the argument from the limited powers of the federal government gained priority over the precedential effect of *Swift v. Tyson*. No legal source announced this rule of priority before *Erie* itself, and even if it did, it would have had to compete with other principles that generally allow the Supreme Court to make binding decisions about the scope of federal power, as it had in *Swift v. Tyson*. Any such legal source would not solve the problem of priority, but only push it to a higher level of abstraction.

This point cannot be dismissed simply as a jurisprudential digression. The positivist argument in *Erie* functions as the linchpin in the argument that federal general common law was created in violation of the limited delegation of powers to the federal government. According to Brandeis, the federal courts made federal general common law under *Swift v. Tyson*; they could not find it in "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute."[33] No such

30. Justice Story emphasized the status of state decisions only as evidence of general common law, but not the law itself. *Swift v. Tyson*, 41 U.S. 1, 18-19 (1842); see Alfred Hill, *The* Erie *Doctrine in Bankruptcy*, 66 Harv. L. Rev. 1013, 1032 (1953).

31. 304 U.S. at 78.

32. Id. at 77-78.

33. Id. at 79.

body of natural law existed. But if they made the law themselves, they acted in excess of the limited powers delegated to the federal government under the Constitution. The problem with this argument is not that it proves too little; it proves too much. It discredits the federal general common law of *Swift v. Tyson*, but also discredits along with it any form of judge-made law, including that made in *Erie* itself.

III. THE CONSEQUENCES OF LEGAL POSITIVISM

One symptom of the problems with the positivist argument in *Erie* is its association with the predictive theory of law. In an unfortunate series of decisions, the Supreme Court admonished the lower federal courts after *Erie* that it required them to follow the decisions of lower state courts, whether or not those decisions were binding on other courts within the state.[34] These decisions, although since disapproved, still make their influence felt in cases in which federal courts have confined themselves to "predicting" what state law is.[35] Just as slavishly following state decisions avoids the risk of making new law, predicting what the state courts will do minimizes the risk that any new law can be blamed upon the federal courts. In cases in which the state courts have not spoken, there are no decisions for the federal courts to follow. The next best thing is to follow the decisions that the state courts are likely to hand down in the future. And indeed, such a predictive theory of law has a close affinity with legal positivism. It is one of the versions of legal positivism espoused by Holmes, the same source from which Brandeis drew the legal positivism in *Erie*. As Holmes said, in a famous aphorism, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[36] This predictive theory of law has been everywhere discredited as a theory of adjudication—except in its application to state law under the *Erie* doctrine.[37]

This symptom of the influence of legal positivism, by itself, would not be cause for alarm. As subsequent decisions have made clear, the restraint upon federal judges promised by the predictive theory of law operates only intermittently.[38] As with many doc-

34. See Friendly, *In Praise of* Erie—*And of the New Federal Common Law* in *Benchmarks* at 173 (cited in note 19).

35. E.g., *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 205 (1956); *Cooper v. American Airlines, Inc.*, 149 F.2d 355, 359 (2d Cir. 1945).

36. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1895).

37. E.g., Hart, *The Concept of Law* at 138-44 (cited in note 21).

38. E.g., *Schein v. Chasen*, 478 F.2d 817 (2d Cir. 1973) (predicting Florida law), vacated sub nom. *Lehman Bros. v. Schein*, 416 U.S. 386 (1974) (ordering certification of ques-

trines aimed only at restraining judicial power, it appears to have succeeded only when federal judges have been inclined to be restrained anyway. Legal positivism casts a far longer shadow over the new federal common law that has grown up after *Erie*, in the wake of the dramatic expansion of federal statutory and constitutional law in recent decades. Doubts continue to be raised, notably by Justice Scalia[39] and Professor Redish,[40] about the legitimacy of federal common law. And even the defenders of federal common law have been anxious to define and limit its scope.[41] These doubts can be traced back, even if they are not entirely dependent on, the shadow that legal positivism casts over any form of common law.

The new federal common law can be defined as judicial decisions, subject to change by Congress, about how to implement basic principles of federal statutory or constitutional law.[42] Unlike the federal general common law abolished by *Erie*, the new federal common law is binding upon the states through the Supremacy Clause. It is, by definition, innovative law. At one extreme, it verges upon statutory interpretation; and at the other, on controversial questions of constitutional law. The precise limits of the new federal common law are not as important as its overall character. An issue of routine statutory interpretation falls outside its scope because the result is dictated by statute. So, too, are decisions that a particular government action is unconstitutional and cannot be authorized by Congress. The defining characteristic of federal common law as it exists today is that it is based upon federal statutes or the Constitution without being plainly determined by them.

It is just such decisions that legal positivism relegates to

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tion to Florida Supreme Court), on remand *Schein v. Chasen*, 313 So.2d 739, 746 (Fla. 1975) (disagreeing with prediction of Florida law). I am grateful to my colleague, Mike Dooley, for this example.

39. *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring in the judgment) (opposing implication of private rights of action from any federal statute). Such doubts, however, have not stopped Justice Scalia from making federal common law himself. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-14 (1988) (implying federal defense to state tort claim). See Donald L. Doernberg, *Juridical Chameleons in the "New* Erie*" Canal*, 1990 Utah L. Rev. 759, 766-70, 782-95.

40. Martin H. Redish, *The Federal Courts in the Political Order: Judicial Jurisdiction and American Political Theory* 29-46 (Carolina Academic Press, 1991).

41. E.g., George D. Brown, *Federal Common Law and The Role of the Federal Courts in Private Law Adjudication—A (New)* Erie *Problem?*, 12 Pace L. Rev. 229, 244-45, 259-61 (1992); Thomas W. Merrill, *The Judicial Prerogative*, 12 Pace L. Rev. 327, 331-32 (1992); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 12-32 (1985) (arguing for restrictions on federal common law).

42. Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 Pace L. Rev. 263, 267 (1992); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 883, 890-96 (1986); Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 30-34 (1975).

sources outside of law. Modern positivists regard this position not so much as a criticism of decisions in hard cases as a frank recognition of the inevitable need for judges to engage in lawmaking.[43] It is only when this positivist premise is combined with principles of limited government and limited judicial power that it casts doubt upon the new common law created by the federal courts. With these added premises, it is easy to conclude that the federal courts lack the power to make law in this way because it was never delegated to them by the Constitution. The fallacy in this argument, which consistent positivists can easily avoid, is the supposition that the need for lawmaking in hard cases always biases the decision in favor of state law. For a consistent positivist, the decision to limit federal judicial power is just as controversial, and just as dependent upon arguments of political theory outside of law, as the decision to make federal common law.

What then do we make of the positivist argument in the *Erie* opinion? It cannot stand alone without falling of its own weight. It must therefore be supported by other arguments of constitutional structure. In particular, it must be narrowed from an attack on all forms of judge-made law to a defense of the binding force of state judicial decisions. After *Erie*, the common law of England is indisputably law, but it is no more binding on the federal courts than the general common law. To put this point another way, as indeed some defenders of the particular result in *Swift v. Tyson* have put it,[44] the federal courts could appeal to the general common law if state law allowed them to do so. If state law did not, then it could be overridden only if, as the Rules of Decision Act says, "the Constitution or treaties of the United States or Acts of Congress otherwise require or provide."[45] The priority of state common law can be derived from the Rules of Decision Act and the Tenth Amendment, but its place in our constitutional scheme can be derived only from principles that are nowhere explicitly stated, let alone reconciled, in any authoritative source of law.

The fundamental question about the new federal common law is whether it has a sufficient foundation in the Constitution or in federal statutes to override state law.[46] I do not mean to minimize the difficulty of this question. The point of this comment has been that the difficulty of this question should not predispose courts to

43. See supra note 21.

44. William P. LaPiana, Swift v. Tyson *and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America*, 20 Suffolk U. L. Rev. 771, 798-814 (1986).

45. 28 U.S.C. § 1652 (1988).

46. Kramer, 12 Pace L. Rev. at 288 (cited in note 42).

answer it in favor of state law. The legal positivism selectively endorsed by Justice Brandeis had only the federal general common law as its target, not the new federal common law that has since developed. His opinion applying federal common law to an interstate water dispute, handed down the same day as *Erie*, demonstrates that he did not share the general positivist distrust of judicial lawmaking.[47] Neither should we. The limits of the new federal common law must instead be sought in the federal statutes and the constitutional provisions that any particular piece of federal common law serves and from which it draws its force. These are the sources of the new federal common law, but as in *Erie* itself, they are genuine sources of law—the origin, not the end, of federal judge-made law.

47. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).